IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1064 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

UMEDJI AMARSANG THAKOR

Versus

STATE OF GUJARART

Appearance:

1. Criminal Appeal No. 1064 of 2000

MR BS SUPEHIA for appellant.

THROUGH JAIL for appellant.

MR.BD DESAI, ADDL.PUBLIC PROSECUTOR for Respondent

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.H.KADRI

Date of decision: 20/01/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 374(2) of the Code of Criminal Procedure, is directed against judgment dated March 2, 2000, rendered by the learned Additional Sessions Judge, Mehsana, camp at Patan, in Sessions Case No.239 of 1998, by which the appellant is convicted of the offences punishable under Sections 376 and 506(2) of Indian Penal Code and sentenced to suffer R.I. for 10 years and fine of Rs.1000/-, in default, S.I. for one year, for having committed offence punishable under Section 376 I.P.C. as well as R.I. for one year and fine of Rs.500/-, in default, S.I. for 3 months, for having committed offence punishable under Section 506(2) I.P.C. It may be stated that the learned Additional Sessions Judge has directed that all sentences shall run concurrently and that the appellant will be entitled to the benefit of set-off under Section 428 of the Code of Criminal Procedure.

2. In view of decision in State of Punjab v. Ramdev Singh, 2003 AIR SCW 6947, this Court does not propose to mention name of the victim. The victim at the relevant time was residing at village Sedrana, Taluka : Sidhpur, District : Patan. Name of her father is Anarji Jitaji Thakor, whereas name of her mother is Hiraben. She has four brothers and one sister and is youngest child of her parents. The incident in question had taken place on July 30, 1998. On the date of the incident at about 12.00 noon, the victim had gone on the way to village Ganglasan for grazing cattle. After grazing cattle upto 4.00 P.M. she had started for returning to her home and was walking on narrow kachcha approach road (Neliya). At that time, the appellant, who was standing there, had caught hold of her and taken her forcibly to a dry-stream (water-hole). Thereafter she was made to lie on the ground and after lifting her petticoat, the appellant had committed rape on her. The victim had raised shouts for help, but could not be rescued, as the place where rape on her was committed, was deserted one. When the victim was raising shouts for help, the appellant had threatened to injure her with a knife and had gagged her mouth by his hands. Meanwhile, one Nagjiji Odharji, who was coming with his goats, was passing nearby the place where rape on the victim was being committed. Nagjiji had witnessed that the appellant was committing rape on her and therefore, on seeing Nagjiji, the appellant had run away with knife. The victim had narrated the incident to Nagjiji, who had brought her to her home. At the home, the victim had narrated the incident to her parents and,

therefore, his brother Fatesinh, who was residing at village Unava, was summoned. The victim had shown inclination to lodge complaint and after her brother had come from village Unava at about 6.00 to 7.00 P.M. the victim in the company of her brother had gone to Kakoshi Police Station on foot and reached the police station at about 1.00 A.M. At the police station, the victim had lodged complaint. The victim had complained of breast pain because while committing rape the appellant had pressed the same forcibly. Therefore, she was required to take treatment for a month at different dispensaries located at village Kakoshi, Sidhpur and Mehsana town. The complaint lodged by the victim was handed over to Keshavlal Devjibhai Chaudhary, who was then Senior Police Sub Inspector at Kakoshi Police Station, for investigation. During the course of investigation, the appellant was arrested and the investigating officer had recorded statements of witnesses who were found conversant with the facts of the case. He had also seized certain incriminating articles, which were sent for analysis to Forensic Science Laboratory. On conclusion of investigation, the appellant was chargesheeted in the Court of learned Judicial Magistrate, First Class, Sidhpur, District : Mehsana, of the offences punishable under Sections 376 & 506(2) I.P.C. As the offence punishable under Section 376 I.P.C. is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Mehsana, where it was numbered as Sessions Case No. 239 of 1998. Thereafter the case was made over to the learned Additional Sessions Judge, Mehsana camp at Patan, for trial.

3. The learned Judge had framed charge against the appellant at Exh.9 of the offences punishable under Sections 376 & 506(2) I.P.C. The charge was read over and explained to the appellant, who had pleaded not guilty to the same and claimed to be tried. Therefore, prosecution had examined (i) Ismailbhai Jamalbhai Charoliya Momin, PW.1 at Exh.13, (ii) Punjaji Vaghaji Thakor, PW.2 at Exh.15, (iii) Jugaji Gambhirji Thakor, PW.3 at Exh.17, (iv) Diwanji Sohanji Thakor, PW.4 at Exh.19, (v) the victim as PW.5 at Exh.22, (vi) Nagjiji Odharji Thakor, PW.6 at Exh.24, (v) Dr.Kamleshkumar Babulal Parmar, PW.7 at Exh.25, (vi) Anarji Jitaji Thakor, PW.8 at Exh.27, (vii) Keshavlal Devjibhai Chaudhary, PW.9 at Exh.28, (viii) Dr.Kantilal Babaldas Patel, PW.10 at Exh.31, (ix) Dr.Vinodbhai Jethalal Varma, PW.11 at Exh.36, (x) Pravinpuri Shankerpuri Goswami, PW.12 at Exh.39, (xi) Champaklal Narandas Raval, PW.14 at Exh.48 (no witness is examined by prosecution as PW No.13 and, therefore, Champaklal Raval would be PW.No.13), and

(xii) Dr.Rajshekhar Marutichandra Mehta, PW.15 at Exh.50, to prove its case against the appellant. The prosecution had also produced panchnama of place of incident at Exh.14, panchnama of person of the prosecutrix at Exh.16, panchnama of person of the appellant at Exh.18, complaint of the victim at Exh.23, certificate issued by Dr.Kamleshkumar in respect of prosecutrix at Exh.26, certificate issued by Dr.Kantilal in respect of prosecutrix at Exh.32, certificate issued by Dr.Vinodbhai relating to prosecutrix at Exh.37, report of Serologist at Exh.46 etc. in support of its case against the appellant.

4. After recording of evidence of prosecution witnesses was over, the learned Judge had explained to the appellant the circumstances appearing against him in the evidence of prosecution witnesses, and recorded his further statement as required by Section 313 of the Code of Criminal Procedure, 1973. In his further statement, the case of the appellant was that the victim was in love with him and that he had sexual intercourse with her not against her will, but with her consent. It was the further case of the appellant that as this was witnessed by Nagjiji Odharji, who is son of maternal aunt of the victim, the victim had raised an uproar to save herself from disgrace. According to the appellant, a false case was registered against him at the instance of family members of the victim and that the complaint would not have been filed if sexual intercourse between him and the victim had not been witnessed by Nagjiji. It may be mentioned that the appellant had not examined any witness to prove the defence mentioned above, but had examined Chhaganbhai Sendhabhai Prajapati as defence witness no.1 at Exh.53 to establish that the age of the victim on the date of incident was above 16 years.

5. After appreciating the evidence adduced by the parties and hearing the learned counsel of the parties, the learned Judge held that the age of the victim, at the relevant time, was 14 years and that it was proved by the prosecution beyond shadow of doubt that after putting the victim in fear of hurt, the appellant had committed rape on her against her will. In view of the above referredto conclusions, the learned Judge has convicted the appellant of the offences punishable under Sections 376 & 506(2) I.P.C. and imposed sentences referredto above, by judgment dated March 2, 2000, giving rise to instant appeal.

6. Mr.B.S.Supehia, learned counsel of the appellant, contended that Exh.54, which is birth-certificate of the

victim, establishes that the age of the victim, on the relevant date, was more than 16 years and, therefore, the learned Judge was not justified in holding that the age of the victim as on the date of incident was 14 years. What was maintained by the learned counsel of the appellant was that it could not be established by the parents of the victim that they had another daughter having the name of victim, who had expired and, therefore, after holding that Exh.54 was the birth certificate relating to the victim, it should have been held that the age of the victim as on the date of incident was more than 16 years. The learned counsel emphasised that the evidence on record probablises the defence of the appellant that the victim was in love with the appellant and that the appellant had sexual intercourse with her not against her will, but with her consent and as she had filed false complaint at the instance of her family members because sexual intercourse was witnessed by her close relative, the appeal should be accepted. According to the learned counsel of the appellant, the learned Judge of the trial Court has not appreciated the evidence on record in its true perspective and, therefore, the appeal should be allowed.

7. Mr.B.D.Desai, learned Additional Public Prosecutor, argued that the finding recorded by the learned Judge that the victim was aged 14 years at the time when the incident had taken place stands proved by cogent and reliable evidence adduced by the prosecution and, therefore, the plea that the age of the victim was more than 16 years should not be accepted by the Court. What was asserted was that the evidence of victim which stands corroborated by her complaint as well as sworn testimony of witness Nagjiji Odharji Thakor, PW.6 Exh.24 and medical evidence on record establishes that the appellant had committed rape on her and, therefore, irrespective of age of the victim, the well-founded conviction of the appellant under Section 376 I.P.C. should be upheld by the Court.

8. This Court has undertaken a complete and comprehensive appreciation of vital features of the case and the entire evidence with reference to broad and reasonable probabilities of the case. The plea that the finding recorded by the learned Judge that the victim was aged 14 years at the time when rape was committed on her is erroneous and, therefore, should be set aside, has no substance. The evidence of Dr.Kamleshkumar Babulal Parmar at Exh.25 shows that he had examined the victim on July 31, 1998 at Community Health Centre located at Sidhpur town. His evidence further shows that the victim

herself had given history of incident and narrated before the doctor that the appellant had committed rape on her against her will after putting her in fear of hurt. According to Dr.Parmar, on examination he had found that monthly discharge from uterus i.e. menstruation had not commenced, which in turn establishes that she had not attained puberty. The doctor had found that there was primary development of her breast, but private parts were not fully developed. The doctor had not noticed pubic hair. The doctor had also not noticed hair in armpit. According to the doctor, private part of the victim had not fully developed and, therefore, it was not possible to examine the same after inserting an instrument. The doctor had found hymen torn and that it was possible to insert only one finger in her vagina. Though this doctor has been searchingly cross-examined, nothing could be brought on record, which would raise doubt about the version given by him in his examination-in-chief. The findings recorded by Dr.Parmar, which have been referredto above, would establish that the victim as on the date of the incident was not above 16 years of age. Further, the victim was also examined by Dr.Kantilal Babaldas Patel, who was then Medical Officer at Civil Hospital, Mehsana. The evidence of Dr.Kantilal Patel is recorded at Exh.31. His evidence shows that he had examined the victim on July 31, 1998 and that X-rays of her right hand wrist, elbow, hip etc. were taken to ascertain her age. According to the certificate issued by Dr.Kantilal Patel, which is produced on record of the case at Exh.32, radiologically bone age of the victim was approximately 14 to 15 years as on July 31, 1998. The evidence of Dr.Vinodbhai Jethalal Varma, who was Medical Officer at P.H.C. Kakoshi, recorded at Exh.36, shows that monthly discharge from uterus i.e. menstruation had not commenced and that the breasts of the victim were not fully developed. According to this Doctor, there was no growth of pubic hair on her private part nor were there hair in the armpit. This doctor, after examining the victim, has stated that the age of the victim as on July 31, 1998 was between 14 and 15 years. The doctor is fully corroborated by contemporary record i.e. certificate issued by him which is produced on the record at Exh.37. It is relevant to notice that before this doctor also, the victim had stated that the appellant had committed rape on her forcibly. Moreover, evidence of Dr.Rajshekhar Mehta, who was then Civil Surgeon of Mehsana Civil Hospital, would indicate that he was also qualified Radiologist and that he had examined the victim as Dr.K.B.Patel had referred the victim to him for ascertaining her age. According to this doctor, epiphysis of lower end of radius and ulna were not fused

and that epiphysis of iliac crest had appeared, but was not fused; whereas epiphysis of head of femur had appeared and fused. On the basis of the abovereferredto radiological findings it was opined by Dr.Mehta that the age of victim as on July 31, 1998 was between 14 and 15 years. What was asserted by Dr.Mehta is that epiphysis of radius and ulna get fused at the age of 16 or 17 years, whereas epiphysis of pelvis iliac crest get fused between the age of 17 and 19 years.

9. The net result of above discussion clearly establishes that as per medical evidence on record, age of the prosecutrix on the date of incident was about 14 years and the evidence adduced does not establish that age of the prosecutrix was more than 16 years. In the light of medical evidence on record, the evidence of father of the victim will have to be appreciated while deciding question whether age of the victim on the date of incident was more than 16 years. Witness Anarji Jituji Thakor, who is examined as prosecution witness No.8 at Exh.27, shows that he is the father of the victim. According to him, during the subsistence of his marriage, his wife had given birth to 7 daughters and 5 sons, out of whom, one son and five daughters had expired. According to this witness, one daughter had died immediately after her birth and thereafter a daughter was born, who was named Kamuben and that age of Kamuben was between 24 & 25 years when his evidence was recorded before the Court on December 20, 1999. His evidence further shows that after the birth of Kamuben, his wife had given birth to son named Fatesinh, who is alive and was aged about 22 to 23 years. His evidence establishes that his wife had given birth to a son named Jivan, who had expired and after the death of son Jivan, his wife had given birth to a daughter who had same name as that of the victim, but that daughter had lived for 1 1/2 year and had expired. Though this witness has been cross-examined at length, nothing could be brought on record so as to doubt the details given by him about births and deaths of his children as well as age of the victim. The evidence of father of the victim also establishes that age of the victim as on the date of the incident was 14 years and not above 16 years. The defence has examined Chhaganbhai Sendhabhai Prajapati as D.W.1 at Exh.53. This witness was discharging duties as Talati-cum-Mantri of village Sedrana, Taluka : Sidhpur. He had produced Birth and Death Register from 1980, and stated that as per the said register, the victim was born on March 24, 1980. However, the evidence of father of the victim would show that his wife had given birth to a female child after the death of his son jivan and who had

also the same name as that of the victim and, therefore, on appreciation of evidence, the learned Judge has rightly held that the certificate produced at Exh.54 by witness Chhaganbhai Prajapati relates to the sister of the victim, who had expired and is not in respect of the victim herself. The net result of above discussion is that the prosecution has proved beyond reasonable doubt that as on the date of the incident, age of the prosecutrix was 14 years and not above 16 years as suggested by the defence.

10. However,the learned Additional Public Prosecutor, has rightly argued that the question of age of the victim loses its significance because the evidence adduced by the prosecution proves beyond reasonable doubt that the appellant had committed rape on the victim against her will and that the defence has failed to probablise the case that the victim was in love with the appellant and had sexual intercourse with the appellant on her own free will. In this regard, it would be relevant to referto evidence of the victim which is recorded at Exh.22. Her evidence clearly establishes that on the date of incident she had gone to graze cattle and that she was accosted by the appellant while she was returning home. Her case is that the appellant had forcibly caught hold of her and dragged her to dry stream (water-hole) and after making her lie on the ground, had forcibly committed sexual intercourse. She has maintained in her evidence that she had raised shouts for help, but could not be rescued, as the place where rape on her was committed was deserted one and when she had tried to raise shouts, the appellant had gagged her mouth and put her in fear of hurt by means of a knife. According to her, one Nagjiji Odharji Thakor, who was coming with his goats, had seen the appellant committing rape on her and, therefore, the appellant had fled the place of incident with knife. The victim has further maintained in her evidence that Nagjiji had brought her to her home and that the police had recorded her complaint as narrated by her. It was also maintained by her that the appellant had pressed her breasts forcibly, as a result of which she had suffered pain and that she had to take treatment for a month at different dispensaries located at village Kakoshi, Sidhpur and Mehsana town. The victim has been searchingly cross-examined by the defence and her deposition shows that several inconvenient questions were put to her, but, she has maintained in her cross-examination also that sexual intercourse with the appellant had not taken place with her consent and that the appellant had committed rape on her after putting her in fear of hurt. The evidence of the victim is not only

corroborated by her complaint which was filed promptly, but the same is also corroborated by witness Nagjiji Odharji Thakor, who is examined as PW.6 at Exh.24. This witness has stated that on the date of incident he had also gone for grazing cattle and that while returning home, the victim was ahead of him and when he had proceeded further, he had found that the appellant was committing rape on the victim and she was shouting for help. According to this witness, he had heard shouts and on seeing him, the appellant had run away from the place of incident and that immediately the victim had narrated the incident to him. This witness has also stated in his substantive evidence before the Court that thereafter he had brought the victim to her home and that his police statement was also recorded. The witness has specifically denied the suggestion of the defence that the victim was in love with the appellant and that she had sexual intercourse with the appellant on her own free will and that she had filed false complaint because the act of having sexual intercourse was witnessed by him. The discussion of evidence of witness Nagjiji Thakor establishes that the prosecutrix is fully corroborated by this witness, who has no axe to grind against the appellant. Except making bald assertions in his statement recorded under Section 313 of the Code of Criminal Procedure, 1973, the appellant has not adduced any evidence to probablise his defence that the victim was in love with him and that he had sexual intercourse with her not against her will, but with her consent. The evidence produced by the prosecution fully establishes that the appellant had committed rape on the victim against her will and that he had committed offences punishable under Sections 376 & 506(2) I.P.C. After analysing, sifting and assessing the evidence on record with particular reference to its trustworthiness and truthfulness by a process of dispassionate judicial scrutiny, it is difficult to agree with two submissions advanced by the learned counsel of the appellant. The net result of the above discussion is that the appeal lacks merits and is liable to be dismissed.

For the foregoing reasons, the appeal fails and is dismissed. Muddamal to be disposed of in terms of direction given by the learned Judge in the judgment which is impugned in the appeal.

(J.M.Panchal,J.)

(M.H.Kadri,J.)

(patel)